

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

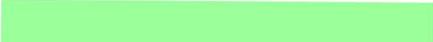


U.S. Citizenship
and Immigration
Services

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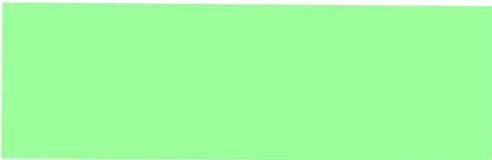


DATE: **MAY 08 2013** OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition, and the petitioner appealed this decision to the Administrative Appeals Office (AAO). The AAO rejected the appeal as untimely filed. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The previous decision of the AAO, dated June 20, 2012, will be affirmed, and the petition will remain denied.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party or the attorney or representative of record must submit the appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The date of filing is not the date of submission, but the date of actual receipt with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i).

The director issued the decision on August 19, 2009. The director properly gave notice to the petitioner that it had 33 days to file the appeal.

The Form I-290B, Notice of Appeal or Motion, was received on September 22, 2009, or 34 days after the decision was issued. Accordingly, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case, the Director, Texas Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii). The AAO properly returned the matter to the director for consideration as a motion to reopen and reconsider, and the director did not reopen it to issue a subsequent decision.

On motion, counsel asserts that the failure to timely file the appeal rests with the United States Postal Service (USPS) for not delivering the appeal on September 21, 2009. The AAO notes that the petitioner submitted the appeal to be mailed with USPS on September 19, 2009, a Saturday, and that the USPS mailing label indicated a handwritten "Scheduled Date of Delivery" of the following Monday, September 21, 2009, which was the last day the appeal could be accepted. While it appears that USPS may have filled out this portion of the mailing label, which is marked "Origin (Postal Service Use Only)," this is inconclusive. The portion of the label titled "Delivery (Postal Use Only)" was not completed. Further, the label contains a section for "Day of Delivery" which contains three options: "Next," "2nd," or "2nd Del. Day." The option for "2nd Del. Day" is selected. Thus, while the postal service notation indicates that the mailing was accepted by USPS on a Saturday afternoon, for "2nd Del. Day" delivery, the label is inconclusive as to the actual day of delivery. As discussed in the AAO's June 20, 2012, decision, the appeal was not actually received until after the regulatory prescribed period for filing an appeal. 8 C.F.R. § 103.3(a)(2)(i). As discussed above, the date of filing is not the date of submission, but the date of actual receipt by U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 103.2(a)(7)(i). Counsel asserts that the petitioner should not adopt a strict construction regarding when an appeal is filed. However, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states without ambiguity that "an appeal which is not

filed within the time allowed must be rejected as improperly filed.” Cf. 8 C.F.R. § 103.5(a)(1)(i) (late filed motion may be excused if it is demonstrated that the delay was reasonable and was beyond the control of the petitioner). The AAO is bound by the Immigration and Nationality Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals within the circuit where the action arose. See *N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff’d*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Therefore, as the appeal was untimely filed, it was properly rejected. Neither the Act nor the regulations grant the AAO authority to extend the time limit. Further, it is unclear what remedy would be appropriate if, as counsel alleges in this instance, delivery was guaranteed by a date certain but delivery failed to occur by the date promised; as the AAO stated in its June 20, 2012, decision, the untimely appeal was properly returned to the director to determine whether it met the requirements for a motion to reopen or a motion to reconsider pursuant to 8 C.F.R. § 103.3(a)(2)(viii).

Even if the AAO did not reject the appeal based on being untimely, the petitioner has not overcome the director’s grounds for denial; therefore, it would still dismiss the appeal as the petitioner has failed to establish the petitioner’s ability to pay the beneficiary’s proffered wage from the priority date onward.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification (labor certification), was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, as certified by the DOL and

submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on January 26, 2006. The proffered wage as stated on the ETA Form 9089 is \$10.72 per hour (\$22,297.60 per year).¹ The ETA Form 9089 states that the position requires 24 months of experience as an "Italian Chef, Specialty Cook, or related Italian cuisine position."

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2001 and to currently employ 11 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on May 25, 2006, the beneficiary did not claim to have worked for the petitioner.

¹ The Form I-140 states that the beneficiary will be paid \$375.20 per week (\$19,510.40 per year) which is less than the prevailing wage and the proffered wage on the labor certification. In counsel's brief accompanying the appeal, counsel asserts for the first time on appeal that "[it] appears the Service is assuming that full-time employment constitutes 40 paid hours per week, but provides no basis for why the common 35-hour paid work week is not acceptable." The job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). The petitioner has not provided any evidence that the position offered is for 35 hours per week. The petitioner has not provided any evidence that it notified DOL that the position offered was for 35 hours per week during its labor certification application, on its prevailing wage request, or in its recruitment for the position. The petitioner has not provided any evidence that a 35 hour work week is the standard work week for the petitioner. The AAO notes that the petitioner's website indicates that it is open to the public six days a week, and that the restaurant is open for 10 or more hours per day. See [REDACTED] (accessed April 25, 2013). Counsel argues that because the proffered wage on the labor certification is stated as hourly, this demonstrates a 35-hour work week. Stating that the proffered wage figure was an hourly figure, rather than an annual figure, is insufficient to document that the position offered was for a 35 hour work week. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage or any wages for 2006 and 2007, but the petitioner did pay the beneficiary the full proffered wage for 2008 as shown by the W-2 Form in the record for this year. The record of proceeding does not contain W-2 Forms for any year other than 2008.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a “real” expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on June 12, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2009 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2008 was the most recent return available. The petitioner’s tax returns demonstrate its net income for 2006, 2007 as shown in the table below.

- In 2006, the Form 1120S stated net income² of \$12,996.00.
- In 2007, the Form 1120S stated net income of \$812.00.

Therefore, for the years 2006 and 2007, the petitioner did not have sufficient net income to pay the proffered wage. As stated above, the petitioner demonstrated its ability to pay the beneficiary’s proffered wage for 2008.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the

² Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S.

petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120S stated net current assets of \$8,463.00.
- In 2007, the Form 1120S stated net current assets of (\$548.00).

Therefore, for the years 2006 and 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

In the record, counsel asserts that the petitioner had the ability to pay the beneficiary in 2006 and 2007 because the beneficiary would have replaced other workers, who the petitioner refers to as "non-owner" employees. The record does not, however, name these workers who were to be replaced in 2006 and 2007, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of these other workers involve the same duties as those set forth in the ETA Form 9089. The petitioner has not documented the position, duty, and termination of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them.⁴

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁴ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant motion.

The petitioner also claims that as of 2008 the beneficiary had replaced the petitioner's former chef, but it does not contain evidence of the wages paid to the former chef or when he left the restaurant. The record contains a letter from the purported chef⁵ before he left the restaurant in which he states that the beneficiary would be hired to expand the business and to create stability to offset the turnover of employees the petitioner has experienced. This assertion suggests the job duties may exceed those enumerated on the labor certification, and casts doubt upon the petitioner's assertion that the beneficiary would be replacing this former chef. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

The affidavit from the petitioner's president also states that his wife's departure from the business in 2005 "would also free up about half to two-thirds of the money needed for the new chef." The record does not contain any evidence of this income and this letter states that she was employed in a supervisory capacity, which is different from the position offered. The record contains a letter from the petitioner's accountant, dated September 14, 2009, which states that the beneficiary was to replace the petitioner's former chef and states the wages this chef was paid. However, the record does not contain evidence of these wages or evidence of when this chef left the petitioner's restaurant. Further, the record contains an affidavit from the purported former chef, dated August 14, 2007, in which he indicates that his title with the petitioner as of that date was "Manager." The letter from the manager discusses the finances of the petitioner only, and does not indicate that he was at that time a chef, or ever previously held the position of chef, at the restaurant. This casts doubt on the claim that this individual was the petitioner's full-time chef. *Matter of Ho*, 19 I&N at 591-592. The petitioner must overcome inconsistencies in the record with independent, objective evidence. *Id.*

Counsel's suggests that the balances in the petitioner's bank accounts demonstrate the petitioner's ability to pay the beneficiary's proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this

⁵ In an affidavit from the petitioner's president, dated June 10, 2009, he indicates that his brother was the restaurant's chef. However, in an affidavit from the brother, dated August 14, 2007, he indicates that his title with the petitioner is "Manager." The letter from the manager discusses the finances of the petitioner, and does not indicate that he was or previously held the position of chef at the restaurant. This earlier affidavit, written two years before the president's affidavit, casts doubt on the later, unsupported assertions of the petitioner's president. *Matter of Ho*, 19 I&N Dec. 582, 591-592. The petitioner must overcome inconsistencies in the record with independent, objective evidence. *Id.*

case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.

The letter from the petitioner's accountant suggests that the paystubs issued to the beneficiary from January 2009 through March 9, 2009, demonstrate the petitioner's ability to pay the proffered wage. This evidence cannot be used to demonstrate the petitioner's ability to pay the proffered wages in prior years. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Counsel's assertions in the record cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the Form I-140 states that the petitioner has been in business since 2001 and that it currently employs 11 workers. The record, including a statement from the petitioner's president,

indicates that from 2006 to 2008 the petitioner's gross receipts and number of employees declined. The record does not contain evidence of any uncharacteristic business losses or expenses in 2006 or 2007, or of the petitioner's reputation in the industry. The petitioner's president indicates that it is plagued by high turnover in its non-owner employees, however, the president also indicates that this is the norm for the industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Further, if the AAO did not reject the petitioner's appeal based on being untimely, the petition was unapprovable for grounds not addressed by the director. Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires 24 months of experience as an "Italian Chef, Specialty Cook, or related Italian cuisine position." On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a Cook for [REDACTED] in Naples, Italy, from October 1, 1990 to October 31, 1992; as a Specialty Cook for [REDACTED] in Durham, North Carolina, from August 1, 1996 to September 30, 1998; and as a Specialty Cook for [REDACTED] in Graham, North Carolina, beginning October 20, 1998.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(I)(3)(ii)(A). The record contains a letter from [REDACTED] which states that the beneficiary was employed there from October 20, 1998 to at least May 31, 2006, the date of signature. This letter has a noticeably similar letterhead format as the offer of employment letter from the petitioner, including the use of multi-colored text in the same locations, the same fonts, the same format, and both letters are dated May 31, 2006. This casts doubt about whether the experience letter originated with [REDACTED]. Further, the beneficiary's Form G-325A, signed by the beneficiary under penalty of perjury on August 10, 2007, conflicts with this letter and states that the beneficiary worked at "[REDACTED]" from May 1999 until at least the date of signature. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the

reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N at 591-592. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* The AAO notes that the letter is signed by the president of [REDACTED] who has the same last name as the beneficiary. Further, according to the North Carolina Department of the Secretary of State, no entity operating under the name [REDACTED] exists. This agency does report an entity with the name [REDACTED] operating at the same address as listed on the experience letter; however, this entity was not formed until January 2012, which is several years after the beneficiary's claimed dates of employment. See <http://www.secretary.state.nc.us/corporations/Corp.aspx?PitemId=9905055> (accessed April 25, 2013). This casts additional doubt on the beneficiary's claimed experience. *Matter of Ho*, 19 I&N at 591-592.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The previous decision of the AAO will be affirmed.

ORDER: The motion to reopen is granted, and the decision of the AAO dated June 20, 2012, is affirmed. The petition remains denied.